

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 6 (Sub-No.492X)

BNSF RAILWAY COMPANY—ABANDONMENT EXEMPTION—  
IN THURSTON COUNTY, WASH.

Decided: July 19, 2016

BNSF Railway Company (BNSF) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon 1.43 miles of rail line between milepost 14.57 and milepost 16.0 in Belmore, Thurston County, Wash. (the Line).<sup>1</sup> Notice of the exemption was served and published in the Federal Register on May 11, 2016 (81 Fed. Reg. 29,316). The exemption became effective on June 10, 2016.<sup>2</sup>

By decision served on June 9, 2016, the Board imposed two environmental conditions recommended by the Board's Office of Environmental Analysis (OEA) in an Environmental Assessment (EA) served on May 16, 2016, and in its final EA dated June 3, 2016. The conditions require BNSF to: (1)(a) pursuant to Section 7 of the Endangered Species Act (16 U.S.C. § 1535), consult with OEA and the U.S. Fish and Wildlife Service (USFWS) to determine if the proposed abandonment could adversely impact any federally listed species, candidate species, or designated critical habitats within the project area and, if any such species are located, USFWS may recommend avoidance and impact mitigation measures to develop appropriate mitigation measures, if necessary, and (b) be prohibited from filing its consummation notice or initiating any salvage activities related to abandonment (including removal of tracks and ties) until the Section 7 consultation process has been completed and the Board has removed this

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<sup>1</sup> The Line is a portion of a 10.2-mile line of railroad currently being leased to the City of Tacoma, Department of Public Utilities, Beltline Division, d/b/a Tacoma Rail or Tacoma Municipal Beltline or TMBL (TMBL). See City of Tacoma, Dep't of Pub. Utils., Beltline Div. d/b/a Tacoma Rail or Tacoma Mun. Beltline or TMBL—Acquis. & Operation Exemption—Lakeview Subdivision, Quadlok-St. Clair & Belmore—Olympia Rail Lines in Pierce & Thurston Cts., Wash., FD 34555 (STB served Oct. 19, 2004). In the verified notice, BNSF stated that TMBL would be filing for discontinuance of the Line.

<sup>2</sup> Although the exemption became effective on June 10, 2016, the abandonment cannot be consummated by BNSF until TMBL obtains discontinuance authority.

condition;<sup>3</sup> and (2)(a) in the event that any unanticipated archaeological sites, human remains, funerary items or associated artifacts are discovered during salvage activities, BNSF shall immediately cease all work and notify OEA and the Washington State Department of Archaeology and Historic Preservation (State Historic Preservation Office or SHPO), pursuant to 36 C.F.R. § 800.13(b) and (b) OEA will then consult with the SHPO, BNSF, and other consulting parties, if any, to determine whether appropriate mitigation measures are necessary.

In the EA served on May 16, OEA also stated that the right-of-way may be suitable for other public use following abandonment and salvage of the Line. On May 27, 2016, Thurston County, Public Works (Proponent), filed a request for the issuance of a notice of interim trail use or abandonment (NITU) to negotiate with BNSF for acquisition of the Line for use as a trail under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29.<sup>4</sup> Pursuant to 49 C.F.R. § 1152.29, the Proponent has also submitted a statement of willingness to assume financial responsibility for the right-of-way and has acknowledged that the use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service. In a response filed on June 2, 2016, BNSF states that it does not object to the requested issuance of the NITU.

Because the Proponent's request complies with the requirements of 49 C.F.R. § 1152.29 and BNSF is willing to negotiate for trail use, a NITU will be issued. The parties may negotiate an agreement for the right-of-way during the 180-day period prescribed below. If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2) and (h). However, the parties may not implement any interim trail use agreement before TMBL has obtained the necessary discontinuance authority, as described above. If no agreement is reached within 180 days, BNSF may fully abandon the Line, subject to any outstanding conditions. 49 C.F.R. § 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

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<sup>3</sup> In addition to TMBL obtaining authority prior to consummation, BNSF must also request, and the Board must remove, this imposed environmental condition, which is a barrier to consummation.

<sup>4</sup> The May 11, 2016 notice provided that requests for trail use/rail banking were to be filed by May 20, 2016. However, in Abandonment & Discontinuance Of Rail Lines & Transportation Under 49 U.S.C. § 10903, 1 S.T.B. 894 (1996) and 2 S.T.B. 311 (1997), the Board retained the policy of accepting requests after the due date when good cause is shown. Because there is no indication that the Proponent's late-filed request will prejudice any party, it will be accepted. See Wheeling & Lake Erie Ry.—Aban. Exemption—in Starke Cty., Ohio, AB 227 (Sub-No. 10X), slip op. at 1 n.1 (STB served Nov. 7, 1997).

The Proponent also has requested imposition of a public use condition under 49 U.S.C. § 10905 for the right-of-way. The Proponent asks that BNSF be prohibited from disposing of the corridor, other than the tracks, ties, and signal equipment, except for public use on reasonable terms, for a 180-day period from the effective date of the abandonment authorization. The Proponent's justification for its request is that this corridor has considerable value for recreational trail purposes and that the 180-day period is needed to assemble and review title information, complete a trail plan, and begin negotiations with BNSF.

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired for public use as a trail under 49 U.S.C. § 10905. See Rail Abans.—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986). Under § 10905, the Board may prohibit the disposal of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment.

To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the period of time requested. 49 C.F.R. § 1152.28(a)(2). Because the Proponent has satisfied these requirements, a 180-day public use condition will be imposed, requiring BNSF to keep intact the right-of-way (including trail-related structures such as bridges, trestles, culverts, and tunnels) and be prohibited from disposing of the corridor (other than tracks, ties, and signal equipment), commencing from June 10, 2016, the effective date of the exemption.

When proper requests for interim trail use/rail banking and public use conditions are made, it is the Board's policy to impose both conditions concurrently, subject to the execution of a trail use agreement. Here, however, while both conditions will be imposed at this time, the public use condition will expire on December 7, 2016, while the trail use negotiating period will run 180 days from the service date of this decision and notice, until January 16, 2017. If a trail use agreement is reached for a portion of the right-of-way prior to January 16, 2017, BNSF must keep the remaining right-of-way intact for the remainder of the 180-day public use condition period to permit public use negotiations. Also, a public use condition is not imposed for the benefit of any one potential purchaser, but rather to provide an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, BNSF is not required to deal exclusively with the Proponent, but may engage in negotiations with other interested persons.

This decision, and the proposed abandonment if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. The Proponent's late-filed request for a NITU under 16 U.S.C. 1247(d) is accepted and granted.
3. Upon reconsideration, the notice served and published in the Federal Register on May 11, 2016, exempting the abandonment of the Line described above is modified to the extent necessary to implement interim trail use/rail banking as set forth below to permit the Proponent to negotiate with BNSF for trail use for the rail line, for a period of 180 days from the service date of this decision and notice, until January 16, 2017 , and to permit public use negotiations as set forth below, for a period of 180 days commencing from the effective date of the exemption, until December 7, 2016.
4. Consistent with the public use and interim trail/rail banking conditions imposed in this decision and notice, BNSF may discontinue service. BNSF shall keep intact the right-of-way, including potential trail-related structures such as bridges, trestles, culverts, and tunnels, for a period of 180 days, until December 7, 2016, to enable any state or local government agency, or other interested person, to negotiate the acquisition of the right-of-way for public use. If an interim trail use/rail banking agreement is executed before expiration of the 180-day public use condition period, the public use condition will expire to the extent the trail use/rail banking agreement covers the same portion of the right-of-way.
5. If an interim trail use/rail banking agreement is reached, it must require the trail sponsor to assume, for the term of the agreement, full responsibility for: (i) managing the right-of-way; (ii) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability); and (iii) the payment of any and all taxes that may be levied or assessed against the right-of-way.
6. Interim trail use/rail banking is subject to possible future reconstruction and reactivation of the right-of-way for rail service and to the trail sponsor's continuing to meet its responsibilities for the right-of-way described in paragraph 5 above.
7. If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. See 49 C.F.R. § 1152.29(d)(2) and (h).
8. If interim trail use is implemented, and subsequently the trail sponsor intends to terminate trail use on all or any portion of the right-of-way covered by the interim trail use agreement, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

9. If an agreement for interim trail use/rail banking is reached by January 16, 2017, for the right-of-way, interim trail use may be implemented, but not before TMBL obtains the necessary discontinuance authority. If no agreement is reached, BNSF may fully abandon the Line, subject to any outstanding conditions, and subject to TMBL obtaining discontinuance authority.

10. This decision and notice is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.